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9 UNITED STATES DISTRICT COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA

11 IN RE: INCRETIN MIMETICS  
12 PRODUCTS LIABILITY  
13 LITIGATION

} MDL Case No.13md2452 AJB (MDD)

} As to all related and member cases

} ORDER CONCERNING CLAIMS OF  
14 PRIVILEGE AND PRIVILEGE LOGS

15 } [Doc. No. 560]

16 This Order does not replace or amend the Protective Order in this litigation. To the  
17 extent any provision of this Order is or can be interpreted to be inconsistent with the  
18 terms of the Protective Order, the terms of the Protective Order shall govern. This Order  
19 is entered to set forth guidelines and protocols that shall govern: (1) the grounds upon  
20 which a party may assert either the attorney-client privilege or the work product doctrine  
21 and withhold and/or redact information on those bases; (2) the protocol that shall be  
22 followed regarding the preparation of privilege logs pursuant to Fed. R. Civ. P.  
23 26(b)(5)(A)(i)-(ii); and (3) the method for resolving privilege disputes by and among  
24 Plaintiffs and Defendants.

25 **I. GOVERNING LAW**

26 **A. Attorney-Client Privilege: Choice of Law**

27 The parties were unable to reach an agreement on the governing law for attorney-client  
28 privilege issues.

1           **B.     The Work Product Doctrine: Choice of Law**

2 Federal law governs the existence and scope of the work product doctrine in the federal  
3 courts, even where the basis of jurisdiction is diversity of citizenship under 28 U.S.C. §  
4 1332. The Parties have agreed that claims to protection under the work product doctrine  
5 will be governed by federal law.

6           **II.     PROTOCOLS GOVERNING ATTORNEY-CLIENT PRIVILEGE AND**  
7           **WORK PRODUCT DOCTRINE**

8           The Parties have agreed to the following protocol governing the assertion of  
9 attorney-client privilege and work product doctrine in connection with their production  
10 of documents responsive to discovery propounded in this litigation. Privilege logs for  
11 productions served prior to January 1, 2014 need not be revised or updated to conform to  
12 the specifications in this Order.

13           **A.     Redactions Relating to Attorney-Client Privilege and Work**  
14           **Product Doctrine**

15           A party shall redact only those portions of a document that are within the scope  
16 permitted by the attorney-client privilege and/or the work product doctrine. A document  
17 may be withheld in its entirety if the entire document is within the scope of the attor-  
18 ney-client privilege and/or work product doctrine.

19           When a document is redacted on the basis of privilege, an identifier will be  
20 provided on the page or in the load file, stating the basis for redaction to enable the other  
21 party to evaluate the applicability of the claimed privilege and/or work product protec-  
22 tion. The Parties shall identify in a clear manner the legal personnel whose advice or  
23 solicitation thereof forms the basis for the claim of privilege and/or work product  
24 protection, to the extent it cannot be discerned from the portion of the document that was  
25 produced without redaction. Redacted documents otherwise do not need to be logged.  
26 Where a redaction is subsequently lifted by order of the Court or by agreement of the  
27 Parties (e.g., subject to a privilege challenge), the party claiming privilege shall provide a  
28 replacement document with the redaction removed and associate the document with the

original document in the manner provided by the relevant Order governing the production of electronically stored information.

**B. Privilege Log**

Every responsive document withheld from production based on a claim of privilege shall be reflected on a privilege log that complies with Fed. R. Civ. P. 26(b)(5)(A)(i)-(ii). Communications with outside counsel concerning matters relating to the defense of the litigation, including but not limited to fact investigation, document production, responding to discovery, and deposition preparation, that occurred after the first lawsuit was filed (whether in state or federal court) for each respective Defendant, concerning this litigation, are not required to be logged. All other communications with outside counsel are required to be logged. The Parties shall produce privilege logs in Excel format or a similar electronic format that allows text searching, sorting and organization of data. Consistent with Rule 26(b)(5)(A) and the Advisory Committee Comments thereto, a privilege log shall contain the following :

1. The document date;
  2. The source of the document - e.g., custodian/repository;
  3. The identity of the person(s) who prepared the document. Where reasonably discernible and not already evident from a provided email address domain, this information should include the person's employer if the employer is not one of the named defendants or one of its legal entities;
  4. The identity of any person(s) to whom the document was disseminated. Where reasonably discernible and not already evident from a provided email address domain, this information should include the person's employer if the employer is not one of the named defendants or one of its legal entities;
  5. The subject/title of the document (if this information is not itself privileged);
  6. The specific privilege or protection allegedly applicable to the document;
- and

1           7.     A description of the document to include a statement identifying why the  
2 producing party believes the document to be privileged or protected sufficient to enable  
3 the other party to evaluate the applicability of the claimed privilege or protection. Where  
4 identifiable, the description shall identify in a clear manner the legal personnel whose  
5 advice or solicitation thereof forms the basis for the claim of privilege and/or work  
6 product protection. If the claimed privilege is held by an entity other than the defendant  
7 (including its corporate affiliates), the description will identify that entity.

8 When a single document contains a chain of only privileged emails and each email was  
9 not disseminated to a third party or an employee outside the scope of the privilege, the  
10 producing party need log the information listed above in items 1-7 for only the most  
11 recent email in the document pursuant to the following:

12           a)     The producing party must provide the date range of the emails in the  
13 chain, if it spans over seven (7) days.

14           b)     If the information logged in items 5, 6 and 7 listed above of the  
15 privilege log for the most recent email is different for other emails in the chain, the  
16 information for the other emails shall also be logged in the privilege log.

17           c)     To the extent that any emails in the chain are responsive and  
18 non-privileged, without regard to whom the email was forwarded, the producing party  
19 must independently produce the document in redacted form with the non-privileged  
20 emails unredacted.

21           Each producing party will produce a complete and updated privilege log within 45  
22 days of each production. Initial privilege logs will be due 45 days after entry of this  
23 Order. For good cause, a party shall have the right to request an expedited privilege log,  
24 but not sooner than 30 days after production, for certain custodians or document sources  
25 for purposes of deposition preparation. In addition, the Parties shall have the right to  
26 request an extension of the privilege log deadline. If the producing party objects to  
27 providing an expedited privilege log or the receiving party objects to providing an  
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1 extension of time to prepare a privilege log, the Parties will meet and confer in good  
2 faith in an attempt to resolve the disagreement prior to seeking Court intervention. If the  
3 Parties cannot reach an agreement, the requesting party may seek relief from the Court.  
4 When a party locates or identifies previously unknown or unidentified responsive  
5 documents and withholds those documents from production based on a claim of privi-  
6 lege, the party must promptly supplement its privilege log under Fed. R. Civ. P. 26(e)(1)  
7 to reflect those documents.

8 **C. Inadvertent Disclosures**

9 Pursuant to Federal Rule of Evidence 502(d) and the Protective Order in this  
10 litigation, the inadvertent production of a privileged or work product protected document  
11 is not a waiver in the pending case or in any other federal or state proceeding. Inadver-  
12 tent disclosures continue to be governed by the Protective Order, and nothing in this  
13 Order amends or supersedes the Protective Order in any respect. To the extent anything  
14 in this Order could be construed as inconsistent with the Protective Order's provisions  
15 regarding inadvertent disclosures, the Protective Order (and any order amending or  
16 superseding the Protective Order) governs.

17 IT IS SO ORDERED.

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19 DATED: August 14, 2014

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22 Hon. Anthony J. Battaglia  
23 U.S. District Judge  
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